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No. 299

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

LEO ZITTMAN (with whom the Federal Reserve Bank of
New York was impleaded below),

Petitioner,

— against —

J. HOWARD McGRATH, Attorney General, as Successor to
the Alien Property Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER, ZITTMAN

JOSEPH M. COHEN,
Attorney for Petitioner,
36 West 44th Street,
New York 18, N. Y.

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This case is a companion to the case, also here on certiorari, entitled, "Leo Zittman (with whom The Chase National Bank of the City of New York was impleaded below), petitioner, against J. Howard McGrath, Attorney

¹ J. Howard McGrath was substituted in the Court of Appeals for Tom C. Clark, as Attorney General. The terms "Custodian" and "respondent" are used interchangeably to refer either to the Alien Property Custodian or to the Attorney General who succeeded to the Custodian's powers and duties. Exec. Order No. 9788, 1 C.F.R. 1946 Supp. 169.

General, as Successor to the Alien Property Custodian, Respondent", No. 298.² For purposes of convenience, the latter will be referred to as the "Chase case".

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 82 F. Supp. 740 (R. 140). The opinion of the Court of Appeals for the Second Circuit is *per curiam* and is reported at 182 F. 2d 349 (R. 150).³

Jurisdiction

The judgment below was rendered June 2, 1950 (R. 152). Petition for rehearing was filed June 15, 1950, and denied on June 27, 1950 (R. 154). Jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254, writ of certiorari having been granted on November 13, 1950 (R. 155).

² The instant case and the Chase case were brought by the respondent to test the force of a New York State court attachment levied (in a single action brought by petitioner) upon certain blocked bank accounts maintained by two German banks with The Chase National Bank of the City of New York and the Federal Reserve Bank of New York. Though there was but one action in the state court, the respondent filed two separate proceedings in the District Court. One was directed to the attached accounts maintained with the Federal Reserve Bank of New York. The other was directed to the attached accounts maintained with the Chase National Bank. Each bank was a party to only that proceeding which involved the particular accounts maintained with it. Though the two cases were heard on separate records and briefs and resulted in separate judgments below, they were dealt with by a single opinion both in the District Court and in the Court of Appeals. Neither bank appealed from the judgment of the District Court. The Chase case was brought to test the validity of the attachment. The instant case was brought to test the Custodian's right to possession of the attached accounts, irrespective of the validity of the attachment.

³ The record in the Chase case and in the instant case have been bound together. Record references are to pages of combined record except where otherwise indicated.

Statutes Involved

1. The Congressional Joint Resolution of May 7, 1940, amending § 5(b) of the Trading with the Enemy Act, and the relevant portions of Executive Order 8389, as amended, issued pursuant thereto.
2. The New York Civil Practice Act.
3. The New York Judiciary Law.

The relevant portions of the above-mentioned statutes are set out in the Appendix (pp. 47-54) to petitioner's brief in the Chase case, to which reference is respectfully made.

Summary Statement of the Matter Involved

This case involves essentially the same matter and issues as are involved in the Chase case. Though there are several factual differences (noted *infra*, under the heading "Questions Involved"), the courts below treated this case as involving the same issues as are presented by the Chase case.

Questions Involved

This case arises out of the same state court attachment proceeding as is involved in the Chase case. In his state court attachment suit against the two German banks,⁴ petitioner attached the following:

(1) The accounts maintained by both German banks with the Chase National Bank of the City of New York. These are the subject of the Chase case.

(2) The accounts maintained by the Reichsbank with the Federal Reserve Bank of New York. These are the subject of the instant case.⁵

⁴ The Reichsbank and the Deutsche Gold- und Silber-Scheidebank.

⁵ The Chase accounts were attached on December 11, 1941, at 2:41 P. M., E. S. T.; the Federal Reserve accounts were attached on the same day at 2:20 P. M., E. S. T. (R. 136).

Since the facts of the two cases are essentially the same, they are not repeated here. To avoid duplication, the Court is respectfully referred to the statement made in the Chase case. There are, however, the following differences between the two cases:

(1) The Chase case deals with petitioner's attachment only insofar as it was levied on the Chase accounts (R. 4-7). The instant case deals with the same attachment but only insofar as it was levied on the Federal Reserve accounts (R. 84-86).

(2) The Custodian vested the attached Chase accounts by a "right, title and interest" vesting order. He vested the attached Federal Reserve accounts by a "res" vesting order. The differences between the two types of orders are discussed in our brief in the Chase case at pages 14-17.

(3) The Custodian sued in the Chase case for a declaration that the attachment was void and that he was entitled to the whole of the Chase accounts (R. 7). He sued in the instant case for a declaration only that he is entitled to possession of the Federal Reserve accounts, without challenging the validity of the attachment (R. 86).

In the Chase case, petitioner asserted that his "right, title and interest" vesting order invested him with every right in the attached Chase accounts, to the exclusion of petitioner, because, as he alleged, petitioner's attachment was void by reason of the freezing controls. In the instant case, petitioner asserted that his "res" vesting order invested him with a single right, i.e., the right to possession of the attached Federal Reserve account, notwithstanding petitioner's attachment. Since, in the Chase case, the courts below determined that petitioner's attachment is void and that, therefore, respondent is entitled to all rights to the attached accounts, this adjudication necessarily required the holding that respondent is entitled to prevail

in the lesser claim made here, namely, that he is entitled to possession of the attached Federal Reserve accounts.⁶

Both the District Court and the Court of Appeals treated the two cases as involving the same questions and each court decided both in a single opinion. Since the decisions below rest solely upon the invalidity of the state court attachment, we concur in the view that, as treated by the lower courts, both cases raise the same issues. To avoid duplication, we respectfully refer this Court to our brief in the Chase case, filed simultaneously herewith, in which the questions involved are fully stated and briefed.

Specification of Errors

The court below erred—

1. In holding that the pre-war attachment by petitioner—an American citizen—of the blocked funds of the Reichsbank for jurisdictional purposes, in aid of petitioner's action against the non-resident Reichsbank, is void, and that, therefore, respondent should have a judgment holding him entitled to possession of the entire balance maintained by the Reichsbank with the Federal Reserve, notwithstanding respondent's concession in this case (R. 135) that, under Presidential Executive Order No. 8389, "the bringing

⁶ Respondent did argue below that he was entitled to a decree in the District Court declaring his right to possession of the Federal Reserve accounts solely by reason of his "res" vesting order (on the authority of such cases as *Union Trust Co. v. Garvan*, 254 U. S. 554; *Commercial Trust Co. v. Miller*, 262 U. S. 51) in disregard of the fact that the attached accounts were in the custody and possession of the state court which had levied on them. Apparently, respondent intended the instant case as a test to determine his right to enforce a "res" vesting order in the federal court, even though effective relief could be granted only by the state court which had custody and possession of the *res*. However, the point was never reached in the instant case. The courts below, having found in the Chase case that petitioner's attachment was void, were bound by this holding to find respondent entitled to every right in the attached accounts, including the right to possession of the attached Federal Reserve accounts.

of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden" by the freezing controls "but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action."

2. In holding that this case is controlled by *Propper v. Clark*, 337 U. S. 472, instead of *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*, 339 U. S. 841.

3. In refusing to hold that the District Court should not have entertained this cause.

4. In affirming the judgment of the District Court and refusing to reverse such judgment and direct dismissal of respondent's petition.

CONCLUSION

It is respectfully urged that the judgments of the District Court and the Court of Appeals should be reversed.

Respectfully submitted,

JOSEPH M. COHEN,
Attorney for Petitioner, Zittman,
36 West 44th Street,
New York 18, N. Y.

